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Public Prosecutor v Azilah bin Hadri & Anor

FEDERAL COURT (PUTRAJAYA) — CRIMINAL APPEAL NO 05–185–09 OF 2013(B)

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ARIFIN ZAKARIA CHIEF JUSTICE, RICHARD MALANJUM CJ (SABAH AND SARAWAK), ABDULL HAMID EMBONG, SURIYADI AND AHMAD MAAROP FCJJ

13 JANUARY 2015

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Criminal Procedure — Defence — Alibi — Accused police officer tendered evidence of entry in station diary to show he was elsewhere when murder was committed — Accused failed to call maker of entry in diary to prove its veracity — Whether entry hearsay and inadmissible — Whether alibi defence failed as a result — Whether analysis of calls from accused's mobile phone showed he was at scene of crime — Whether information by accused leading to discovery of crime scene and belongings of deceased admissible under s 27 of the Evidence Act 1950 ('Act') — Whether prosecution established accused had common intention to murder deceased — Whether prosecution's failureto call police officer whose help was sought by ex lover of deceased prejudiced accused — Whether adverse inference should have been invoked against prosecution under s 114(g) of the Act

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The respondents ('Azilah' and 'Sirul'), who were, respectively, an inspector and a corporal in the special action unit of the police force, were found guilty and sentenced to death by the High Court for jointly murdering a Mongolian woman ('Altantuya'). 11 days before she was last seen with the respondents, Altantuya arrived in Malaysia with a relative and a friend to meet a Malaysian ('Baginda') with whom she had been having an affair. Baginda, who was initially charged with the respondents for abetting them in the murder but was acquitted and discharged at the end of the prosecution's case, sought, inter alia, the help of a police officer ('DSP Musa') as he did not want to meet Altantuya. This resulted in Azilah being tasked with the duty of patrolling the area where Baginda's house was located. Baginda told Azilah where Altantuya stayed in a hotel. Accompanied by Sirul, Azilah went to the hotel but could not find her. Their visit to the hotel was recorded on the hotel's CCTV system and the recording was used against the respondents at the trial. When Altantuya went to Baginda's house alone a few days later, the respondents, who were alerted of her visit, came to the house in a car driven by Azilah's girlfriend, PW7, and they took Altantuya away. PW7 testified that she left the respondents and Altantuya at the Police Headquarters in Bukit Aman. The prosecution's evidence was that the respondents then took Altantuya in Sirul's car to a forested hilly area ('PuncakAlam') where a gun and explosives were used in her killing. Police investigations into a missing person report lodged by Altantuya's relative led to the arrest of the respondents. A mobile telephone and SIM cards belonging to

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Altantuya were seized from Azilah. A pair of her blood stained slippers and a spent bullet cartridge was recovered from Sirul's car while jewellery belonging to her was found in one of Sirul's jackets in his house. An analysis of the call logs on Azilah's mobile phone showed that on the night in question he had moved from the vicinity of Baginda's house to Bukit Aman and thereafter to the vicinity of the scene of the crime while a Touch n' Go card found in Sirul's car showed the toll plazas the car had passed through on the night Altantuya disappeared. It was the prosecution's case that Azilah and Sirul separately and independently led police to the crime scene where fragments of Altantuya's bone, hair and tissuewere found. At the trial, Azilah gave notice of alibi and, through a prosecution witness, introduced into evidence a copy of an entry in a police station diary ('D428') showing that on the night of the murder he had taken possession of a glock pistol at Bukit Aman Police Headquarters and then left for Putrajaya to undertake escort duty for the Deputy Prime Minister. In his alibi notice, Azilah had alleged that from Bukit Aman he had made a brief trip to Wangsa Maju before returning to Bukit Aman and then leaving for Putrajaya. Inter alia, the trial judge held that since the maker of D428 was not called to testify to the veracity of the said entry, the same was inadmissible and hence Azilah's defence of alibi failed. Sirul, meanwhile, gave an unsworn statement from the dock when his defence was called. The trial judge held the respondents' defences were mere denials and convicted them. On appeal, the Court of Appeal ('the COA') acquitted and discharged the respondents. In the instant appeal against that decision, the appellant contended, inter alia, that the COA erred in: (i) holding the entry in D428 to be admissible and placing a burden on the appellant to disprove the entry; (ii) rejecting the evidence of thecall logs (P27, P370 and 372B) from Azilah's mobile phone; (iii) failing to appreciate the cogency of evidence tendered pursuant to s 27 of the Evidence Act 1950 ('the Act'); (iv) drawing adverse inference against the prosecution for not calling DSP Musa as a witness; (v) failing to give weight to the evidence of the blood stained slippers found in Sirul's car; and (vi) finding unproven the ingredient of common intention between the respondents to commit the murder. In their submissions, Azilah, inter alia, said his involvement in the case ended when, on the night they arrived at Bukit Aman with Altantuya, he left her in Sirul's custody and then left to attend to his duties as corroborated by the entry in D428. Azilah also contended that the entire s 27 information leading to the discovery of the crime scene was fabricated as he did not lead police to the discovery of the scene but that they were already there when he arrived. Sirul, on the other hand, contended that his involvement with the case ended when, after they had picked up Altantuya from Baginda's house, he was dropped off where his car was parked some distance away from Baginda's house. Sirul also denied giving any information to police that led either to the discovery of the scene of the crime or to the discovery of Altantuya's jewellery in his jacket.

Held, allowing the appeal, setting aside the decision of the COA and reinstating the conviction and death sentence against the respondents:

(1) Azilah's alibi defence was a non-starter as he failed to call the maker of D428 to prove the entry. The investigating officer's testimony that D428 was a true and accurate record as provided for under s 97 of the Police Act 1967 and his confirmation that D428 was similar to the original station diary entry did not necessarily establish the truth of its contents. He was not the maker of the entry. Only the maker could confirm the truth of the entry and unless that was done the contents of D428 remained hearsay. With only a notice of alibi and an unproved D428 to fall back on, Azilah was left high and dry and hence the reason why the trial judge said his defence was a mere denial. With the call logs establishing that Azilah had made calls from the scene of the crime, his defence of alibi was unsustainable. By no account could he have been at Bukit Aman or Wangsa Maju at the material time (see paras 43, 48–49 & 120–121).

(2) The neutral information contained in the call logs (P27, P370 and P372B) was admissible and affirmatively pin-pointed the date, time and place of the caller, ie Azilah, every time he made a call. They showed his last position was at Puncak Alam. What was also obvious was that none of the calls from Azilah's mobile phone were detected to have been transmitted from Wangsa Maju or Bukit Aman during the material time. The respondents could not have been anywhere else except at the places indicated by the call logs ie Puncak Alam. There was no evidence to show the call logs had been tampered with and they were produced by computers in the course of their ordinary use by their very makers, namely PW61, PW62 and PW63, all of whom testified at the trial. D428, to which no weight could be attached, could not cast any reasonable doubt on the unimpeachable call logs and Azilah's assertion that he was at Bukit Aman collecting a glock at 10.18pm and then left Bukit Aman for Putrajaya at 10.20pm was without any corroboration (see paras 58–59 & 62–63).

(3) The court was satisfied the police did not know the exact location of the scene of the crime had it not been independently pointed out to them by the respondents. Azilah's act of pointing to the place where the deceased's remains were found amounted to information. That information was the distinct cause of the discovery of the deceased's remains before Sirul arrived with another set of officers to show police the same location shown earlier by Azilah. Nowhere was it shown or established that the police had prior knowledge of the exact location. There was no evidence the respondents were intimated, induced or tortured and no reason for the court to exclude the information given by the respondents in the exercise of its discretion under s 27 of the Act. Similarly, information given by Sirul led to the discovery of the deceased's jewellery in his jacket in his house. Sirul did not explain his possession of the jewellery which not only was indicative of the offence of theft or possession of stolen property but of any other more aggravated crime, in this case the murder

of the deceased. At the very least, it raised the presumption he was present at Puncak Alam(see paras 76–78, 88 & 93).

(4) The non-calling of DSP Musa or the non-tendering of the SMS messages between him and Baginda and Azilah had not in any way caused unfairness to the respondents and the presumption of adverse inference under s 114(g) of the Act was inapplicable here. The respondents alleged they were deprived of the opportunity to cross-examine DSP Musa with regard to Baginda's sworn affidavit. But the contents of Baginda's affidavit merely confirmed other evidence that he had a previous relationship with the deceased and that he had requested for help from DSP Musa. The affidavit also contained general exculpatory remarks beneficial only to Baginda. There was no serious dispute about Baginda's relationship with the deceased. The calling of DSP Musa, let alone the tendering of the SMS, would not have affected the evidence of Baginda's previous relationship one bit. DSP Musa had never instructed Azilah on how to assist Baginda but was merely told to meet up with him; Azilah thereafter had acted on his own discretion and sensibilities (see paras 95–97).

(5) Sirul's unsworn statement did not carry much weight because his story was inconsistent with other cogent evidence tendered in court. He said his involvement with the deceased ended when he left her with Azilah in PW7's car outside Baginda's house. The discovery of the deceased's blood stained slipper in his car, her jewellery in his house and the evidence of the passage of his car through the Kota Damansara Toll Plaza enroute to Puncak Alam totally discredited his unsworn statement that his involvement ended outside Baginda's house. With a discredited unsworn statement left as a defence, Sirul was as good as left with no defence (see para 122).

(6) By linking all the connective pieces of evidence when the respondents were together until the day when the scene of the crime was independently and separately shown by them, the curt was satisfied the prosecution had established the ingredient of common intention between the respondents to commit the crime (see para 115).

(7) The respondents had failed to cast a reasonable doubt on the prosecution's case and, after a maximum evaluation of the evidence, the court was absolutely satisfied the prosecution had successfully proven its case beyond reasonable doubt (see para 124).

[Bahasa Malaysia summary

Responden-responden ('Azilah' dan 'Sirul'), masing-masing merupakan inspektor dan korporal dalam unit tindakan khas pasukan polis, telah didapati bersalah dan dihukum mati oleh Mahkamah Tinggi kerana secara bersesama membunuh seorang wanita Mongolia ('Altantuya'). 11 hari sebelum kali terkahir dia dilihat dengan responden-responden, Altantuya telah tiba di

A Malaysia dengan seorang saudara dan seorang kawan untuk berjumpa dengan seorang rakyat Malaysia ('Baginda') yang mana dia mempunyai hubungan sulit. Baginda, yang pada mulanya dituduh bersama responden-responden kerana bersubahat dengan mereka dalam pembunuhan itu tetapi telah dibebas dan dilepaskan di akhir kes pendakwaan, memohon, antara lain, bantuan B pegawai polis ('DSP Musa') kerana dia tidak ingin berjumpa Altantuya. Ini menyebabkan Azilah dipertanggungjawabkan dengan tugas meronda kawasan di mana terletaknya rumah Baginda. Baginda memberitahu Azilah di mana Altantuya sedang menginap di sebuah hotel. Dengan ditemani oleh Sirul, Azilah telah pergi ke hotel itu tetapi tidak menjumpainya. Rondaan mereka ke C hotel itu telah dirakam oleh sistem CCTV hotel itu dan rakaman itu telah digunakan terhadap responden-responden semasa perbicaraan itu. Apabila Altantuya sendiri pergi ke rumah Baginda beberapa hari kemudian, responden-responden, yang telah diberitahu tentang lawatannya, telah datang ke rumah itu di dalam kereta yang dipandu oleh teman wanita Azilah, PW7, D dan mereka telah membawa Altantuya pergi. PW7 memberi keterangan bahawa dia telah meninggalkan responden-responden dan Altantuya di Ibu Pejabat Polis di Bukit Aman. Keterangan pendakwaan adalah bahawa responden-responden kemudian telah membawa Altantuya dalam kereta Sirul ke kawasan hutan berbukit ('Puncak Alam') di mana sepucuk pistol dan bahan E letupan telah digunakan dalam pembunuhannya. Siasatan polis dalam laporan orang hilang yang dibuat oleh saudara mara Altantuya membawa kepada tangkapan responden-responden. Telefon bimbit dan kad SIM milik Altantuya telah dirampas daripada Azilah. Sepasang selipar dengan kesan darahnya dan kelongsong katrij peluru telah ditemui dari kereta Sirul manakala barang F kemas miliknya dijumpai di dalam salah satu daripada jaket Sirul di rumahnya. Satu analisis log panggilan pada telefon bimbit Azilah menunjukkan bahawa pada malam yang dipersoalkan dia telah bergerak dari kawasan sekitar rumah Baginda ke Bukit Aman dan kemudian ke kawasan sekitar tempat kejadian jenayah manakala kad Touch n' Go yang dijumpai di dalam kereta Sirul G menunjukkan plaza-plaza tol yang dilalui kereta itu pada malam Altantuya hilang. Adalah kes pendakwaan bahawa Azilah dan Sirul secara berasingan dan bebas membawa polis ke tempat kejadian di mana tulang, rambut dan tisu badan Altantuya dijumpai. Semasa perbicaraan, Azilah telah memberikan notis alibi dan, melalui saksi pendakwaan, telah memperkenalkan dalam H keterangan sesalinan kemasukan dalam diari balai polis ('D428') yang menunjukkan bahawa pada malam pembunuhan itu dia telah mengambil milikan sepucuk pistol glock di Ibu Pejabat Bukit Aman dan kemudian bertolak ke Putrajaya untuk menjalankan tugas pengiring untuk Timbalan Perdana Menteri. Dalam notis alibinya, Azilah mengatakan bahawa dari Bukit I Aman dia telah berhenti sekejap di Wangsa Maju sebelum kembali ke Bukit Aman dan kemudian bertolak ke Putrajaya. Antara lain, hakim perbicaraan memutuskan oleh kerana pembuat D428 tidak dipanggil untuk memberi keterangan berhubung kebenaran kemasukan tersebut, maka yang sama tidak boleh diterima masuk dan justeru pembelaan alibi Azilah gagal. Sirul pula telah

memberikan kenyataan tidak bersumpah dari kandang pesalah apabila pembelaannya dipanggil. Hakim perbicaraan memutuskan pembelaan responden-responden hanya penafian semata-mata dan telah mensabitkan mereka. Semasa rayuan, Mahkamah Rayuan ('MR') telah membebas dan melepaskan responden-responden. Dalam rayuan ini terhadap keputusan tersebut, perayu berhujah, antara lain, bahawa MR telah terkhilf dalam (i) memutuskan kemasukan dalam D428 boleh diterima masuk dan meletakkan bebas atas perayu untuk menyangkal kemasukan itu; (ii) menolak keterangan tentang log-log panggilan (P27, P370 dan 372B) daripada telefon bimbit Azilah; (iii) gagal menyedari keterangan yang meyakinkan telah ditenderkan menurut s 27 Akta Keterangan 1950 ('Akta tersebut'); (iv) membuat inferens bertentangan terhadap pendakwaan kerana tidak memanggil DSP Musa sebagai saksi; (v) gagal memberi perhatian kepada keterangan tentang selipar dengan kesan darah dalam kereta Sirul; dan (vi) tidak dapat membuktikan elemen niat bersama antara responden-responden untuk melakukan pembunuhan itu. Dalam penghujahan mereka, Azilah, antara lain, mengatakan penglibatannya dalam kes itu berakhir apabila, pada malam itu mereka sampai di Bukit Aman dengan Altantuya, dia telah meninggalkannya dalam jagaan Sirul dan kemudian telah pergi untuk melaksanakan kewajipannya sebagaimana disokong oleh kemasukan dalam D428. Azilah juga berhujah bahawa keseluruhan maklumat s 27 yang membawa kepada penemuan tempat kejadian jenayah itu telah dipalsukan kerana dia tidak membawa polis kepada penemuan tempat kejadian itu tetapi bahawa mereka telah pun berada di situ semasa dia tiba. Sirul, sebaliknya, berhujah bahawa penglibatannya dalam kes ini berakhir apabila, selepas mereka mengambil Altantuya dari rumah Baginda, dia telah ditinggalkan di mana keretanya diletakkan tidak jauh daripada rumah Baginda. Sirul juga menafikan telah memberikan apa-apa maklumat kepada polis yang membawa kepada penemuan tempat kejadian jenayah itu atau kepada penemuan barang kemas Altantuya dalam jaketnya.

Diputuskan, membenarkan rayuan, mengetepikan keputusan MR dan mengembalikan semula sabitan dan hukuman mati terhadap responden-responden:

(1) Pembelaan alibi Azilah bukan pemula kerana dia gagal memanggil pembuat S428 untuk membuktikan kemasukan itu. Keterangan pegawai penyiasat bahawa D428 adalah rekod sebenar dan tepat sebagaimana diperuntukkan di bawah s 97 Akta Polis 1967 dan pengesahannya bahawa D428 adalah sama dengan kemasukan diari balai yang asal tidak perlu dibuktikan kebenaran kandungannya. Dia bukan pembuat kemasukan itu. Hanya pembuat itu boleh mengesahkan kebenaran kemasukan itu dan kecuali ianya dilakukan bahawa kandungan D428 hanyalah dengar cakap. Dengan hanya notis alibi dan D428 yang tidak dibuktikan sebagai sokongan, Azilah dalam keadaan sukar dan justeru

A alasan kenapa hakim perbicaraan menyatakan pembelaannya hanya penafian semata-mata. Dengan log-log panggilan membuktikan bahawa Azilah telah membuat panggilan dari tempat kejadian jenayah itu, pembelaan alibinya tidak mampan. Tidak mungkin dia berada di Bukit Aman atau Wangsa Maju pada masa matan (lihat perenggan 43, 48–49 & 120–121).

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(2) Maklumat neutral yang terkandung dalam log-log panggilan (P27, P370 dan P372B) boleh diterima dan dengan tepat menunjukkan tarikh, masa dan tempat pemanggil, iaitu Azilah, setiap kali dia membuat panggilan. Ia menunjukkan kedudukan terakhirnya adalah di Puncak Alam. Apa yang juga jelas adalah tiada panggilan daripada telefon bimbit Azilah dikesan sebagai telah dihantar dari Wangsa Maju atau Bukit Aman sepanjang masa matan itu. Responden-responden tidak mungkin berada di tempat lain kecuali di tempat-tempat yang ditunjukkan oleh log-log panggilan itu iaitu Puncak Alam. Tiada keterangan menunjukkan log-log panggilan itu telah diubah dan telah dihasilkan oleh komputer dalam penggunaan biasanya oleh pembuatnya, iaitu PW61, PW62 dan PW63, kesemuanya yang telah memberi keterangan semasa perbicaraan. D428, di mana tiada beban boleh dikaitkan, tidak boleh meletakkan apa-apa keraguan munasabah pada log-log panggilan yang tidak dapat disangsikan dan penegasan Azilah bahawa dia berada di Bukit Aman untuk mengambil glock itu pada pukul 10.18 malam dan kemudian bertolak ke Putrajaya pada pukul 10.20 malam adalah tanpa apa-apa sokongan (lihat perenggan 58–59 & 62–63).

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(3) Mahkamah berpuas hati yang polis tidak mengetahui lokasi sebenar kejadian jenayah itu jika tidak ditunjukkan secara berasingan kepada mereka oleh responden-responden. Tindakan Azilah menunjukkan tempat di mana mayat si mati dijumpai dianggap sebagai maklumat. Maklumat tersebut adalah sebab jelas penemuan mayat si mati sebelum Sirul tiba dengan sepasukan pegawai lain untuk menunjukkan polis lokasi sama yang ditunjukkan oleh Azilah. Tiada di mana-mana yang menunjukkan atau dibuktikan bahawa polis mempunyai pengetahuan sebelum itu tentang lokasi sebenar. Tiada keterangan yang responden-responden diugut, didorong atau diseksa dan tiada sebab untuk mahkamah mengecualikan maklumat yang diberikan oleh responden-responden dalam melaksanakan budi bicaranya di bawah s 27 Akta tersebut. Begitu juga, maklumat yang diberikan oleh Sirul membawa kepada penemuan barang kemas si mati di dalam jaketnya di rumahnya. Sirul tidak memberi penjelasan berhubung milikannya ke atas barang kemas itu yang bukan sahaja petunjuk tentang kesalahan kecurian atau milikan harta dicuri tetapi tentang apa-apa jenayah lain yang lebih berat, dalam kes ini pembunuhan si mati. Sekurang-kurangnya, ia telah menimbulkan andaian yang dia berada di Puncak Alam (lihat perenggan 76–78, 88 & 93).

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(4) DSP Musa yang tidak dipanggil atau pesanan SMS yang tidak ditenderkan antara dia dan Baginda dan Azilah tidak dalam apa cara telah menyebabkan ketidakadilan kepada responden-responden dan andaian inferens bertentangan di bawah s 114(g) Akta tersebut adalah tidak terpakai di sini. Responden-responden mengatakan mereka dinafikan peluang untuk memeriksa balas DSP Musa berkenaan afidavit bersumpah Baginda. Namun kandungan afidavit Baginda hanya mengesahkan keterangan lain bahawa dia mempunyai hubungan sebelumnya dengan si mati dan bahawa dia telah meminta pertolongan daripada DSP Musa. Afidavit itu juga mengandungi kenyataan pembuktian tidak bersalah umum yang hanya memberi manfaat kepada Baginda. Tiada pertikaian serius tentang hubungan Baginda dengan si mati. Dengan memanggil DSP Musa, ataupun dengan hanya menenderkan SMS itu, tidak sedikitpun akan menjejaskan keterangan tentang hubungan sebelum Baginda. DSP Musa tidak pernah mengarahkan Azilah tentang bagaimana untuk membantu Baginda tetapi hanya memberitahu untuk bertemu dengannya; Azilah kemudian telah bertindak atas budi bicara dan kepekaannya (lihat perenggan 95–97).

(5) Kenyataan tanpa sumpah Sirul tidak memberi kesan kerana ceritanya tidak konsisten dengan keterangan meyakinkan lain yang ditenderkan di mahkamah. Dia mengatakan penglibatannya dengan si mati berakhir apabila dia meninggalkannya dengan Azilah dalam kereta PW7 di luar rumah Baginda. Penemuan selipar dengan kesan darah si mati dalam keretanya, barang kemasnya dalam rumah dia dan keterangan tentang perjalanan keretanya melalui Plaza Tol Kota Damansara ke Puncak Alam memang menimbulkan keraguan terhadap kenyataan tidak bersumpahnya bahawa penglibatannya telah berakhir di luar rumah Baginda. Dengan kenyataan tidak bersumpah yang diragui itu sebagai pembelaan, Sirul sama seperti tiada pembelaan (lihat perenggan 122).

(6) Dengan mengaitkan semua penghubung keterangan bila responden-responden bersama sehingga hari apabila kejadian jenayah ditunjukkan secara bebas dan berasingan oleh mereka, mahkamah berpuas hati yang pendakwaan telah membuktikan elemen niat bersesama antara responden-responden melakukan jenayah itu (lihat perenggan 115).

(7) Responden-responden telah gagal menimbulkan keraguan munasabah atas kes pendakwaan dan, selepas penilaian maksimum keterangan, mahkamah benar-benar berpuas hati yang pendakwaan telah berjaya membuktikan kesnya melampuai keraguan munasabah (lihat perenggan 124).]

Notes

For cases on alibi, see 5(1) *Mallal's Digest* (4th Ed, 2014 Reissue) paras 1944–1976.

Cases referred to

(1) Namasiyiam (2) Rajindran (3) Goh Chin Peng, and (4) Ng Ah Kiat v PP [1987] 2 MLJ 336, SC (refd)
Abdullah bin Saad v PP [1956] 1 MLJ 92, CA (refd)
Ahmad Najib bin Aris v PP [2009] 2 MLJ 613, FC (refd)
Allied Bank (Malaysia) Bhd v Yau Jiok Hua [1998] 6 MLJ 1, HC (refd)
Amathevelli a/p P Ramasamy v PP [2009] 2 MLJ 367; [2009] AMR 281, FC (refd)
Chan Chwen Kong v PP [1962] 1 MLJ 307; [1962] 1 LNS 22, CA (refd)
Chong Soon Koy v PP [1977] 2 MLJ 78, FC (folld)
Dato' Mokhtar bin Hashim & Anor v PP [1983] 2 MLJ 232; [1983] 2 CLJ (Rep) 101 (refd)
Dato' Seri Anwar bin Ibrahim v PP [2004] 1 MLJ 177, CA (refd)
Francis Antonysamy v PP [2005] 3 MLJ 389; [2005] 2 CLJ 481, FC (refd)
Gnanasegaran a/l Pararajasingam v PP [1997] 3 MLJ 1, CA (refd)
Goi Ching Ang v PP [1999] 1 MLJ 507, FC (refd)
Gurcharan Singh & Anor v State of Punjab AIR 1956 SC 460, SC (refd)
Harris v Director Public Prosecutions [1952] 1 All ER 1044, HL (refd)
Jayantibhai Bhenkarbhai v State of Gujarat (SC of India) Appeal (Crl) 555 of 2001, SC (refd)
Juahir bin Sadikon v Perbadanan Kemajuan Ekonomi Negeri Johor [1996] 3 MLJ 627 CA (refd)
Krishna Rao Gurumurthi & Anor v PP & Another Appeal [2007] 4 CLJ 643, CA (refd)
Magendran a/l Mohan v PP [2011] 6 MLJ 1; [2011] 1 CLJ 805, FC (refd)
Mazlan bin Othman v PP [2013] 1 AMR 600, CA (refd)
Miller v Minister of Pensions [1947] 2 All ER 372, KBD (refd)
Mohamad bin Deraman v PP [2011] 3 MLJ 289, CA (refd)
Ong Chee Hoe & Anor v PP [1999] 4 SLR 688,CA (refd)
Pang Chee Meng v PP [1992] 1 MLJ 137, SC (refd)
PP v Hashim bin Hanafi [2002] 4 MLJ 176, HC (refd)
PP v Krishna Rao a/l Gurumurthi & Ors [2000] 1 MLJ 274, HC (folld)
PP v Letchumanan a/l Krishnan [2008] 3 MLJ 290; [2007] 1 LNS 409, HC (refd)
PP v Mohd Aszzid Abdullah [2008] 1 MLJ 281, HC (refd)
PP v Mohd Radzi bin Abu Bakar [2005] 6 MLJ 393, FC (refd)
PP v Saimin & Ors [1971] 2 MLJ 16 (refd)
R v Fuller (1816) R & R 308 (refd)
R v Rockman (1789) 2 East PC (refd)
Ram Avtar v The State (Delhi Administration) AIR 1985 SC 1692, SC (refd)

Siew Yoke Keong v PP [2013] 3 MLJ 630; [2013] 4 CLJ 149, FC (refd) A
Ti Chuee Hiang v PP [1995] 2 MLJ 433; [1995] 3 CLJ 1, SC (refd)
Udayar Alagan & Ors v PP [1962] 1 MLJ 39, CA (refd)

Legislation referred to

Courts of Judicature Act 1964 s 60(1) B
Criminal Procedure Code ss 173(h), 402A
Evidence Act 1950 ss 11, 27, 90A, 90A(2), 103, 112(2), (4), (5), 113, 114(a), (g), (f), Illustrations (a)
Penal Code ss 34, 302
Police Act 1967 s 97 C

Appeal from: Criminal Appeal Nos B-06A-19 of 2009 and B-06A-19A of 2009 (Court of Appeal, Putrajaya)

Tun Abd Majid Tun Hamzah (Deputy Public Prosecutor, Attorney General's Chambers) for the appellant. D
J Kuldeep Kumar (Hazman Ahmad and Athari Bahardin with him) (J Kuldeep Kumar & Co) for the respondents.
Kamarul Hisham (Hasnal Rezua Merican and Ahmad Zaidi Zainal with him) (The Chambers of Kamarul Hisham & Hasnal Rezua) for the respondents. E

Suriyadi FCJ (delivering judgment of the court):

[1] The respondents were jointly charged with the murder of a Mongolian woman named Altantuya Shaariibu ('the deceased'), under s 302 of the Penal F Code, read together with s 34 of the same Code. The offence was alleged to have been committed between 10pm on 19 October 2006 and 1am on 20 October 2006 at a place between Lots 12843 and 16735, Mukim Bukit Raja in the District of Petaling in the State of Selangor Darul Ehsan. One Abdul Razak Baginda ('Baginda') was also charged with the respondents for G abetment of the murder.

[2] It was not disputed by the appellant that the first respondent had sent a notice of alibi (D430) to the appellant pursuant to s 402A of the Criminal Procedure Code (pre-amendment). This piece of evidence was introduced at H the prosecution's stage ie when the investigation officer ('PW75') was giving evidence. As requested by the first respondent, PW75 also introduced the entry of a station diary as ID(D) 428 (p 3310 *Jld* 2ae), and after a protracted argument the entry was marked as D428. If proved, D428 would corroborate the plea of alibi of the first respondent. I

[3] After a maximum evaluation of the appellant's evidence, the trial judge was satisfied that the appellant had established a prima facie case, and accordingly called for the defence of the respondents. On the other hand,

Baginda was acquitted and discharged at this stage. No appeal was filed by the public prosecutor against that acquittal.

[4] At the end of the trial, after a maximum evaluation of the evidence, which took into account the defence posed by both the respondents, the trial judge found the defence raised to be equivalent to mere denials. The trial judge found the plea of alibi unproved by the first respondent whilst the second respondent's unsworn evidence was found as ineffective. As no reasonable doubt had been created over the prosecution's case they were accordingly convicted for murder.

[5] Being aggrieved the respondents appealed to the Court of Appeal. The Court of Appeal unanimously quashed the convictions of both the respondents and had them acquitted and discharged. The acquittals of both the respondents led to this appeal before us.

SUBMISSION BEFORE US

[6] Evidence was adduced to show that Baginda had a failed affair with the deceased and consequently facing its repercusion. When it ended, the deceased came to Malaysia on 8 October 2006 to demand money from Baginda. She flew down together with her second cousin, one Namiraa Gerelmaa ('PW3'), and a friend called Urintuya Gal-Ochir ('PW4'). These two witnesses unfolded the chequered history of Baginda with the deceased, and of her purpose in Malaysia.

[7] Baginda then hired the services of a private investigator ('PW1') to keep an eye on the deceased's movement and activities and also to guard his house and family. As Baginda's house was located at Damansara Heights, and falling under the jurisdiction of the Brickfields police jurisdiction, he then sought the assistance of one Deputy Superintendent of Police Musa Safri ('DSP Musa'), the ADC to the then Deputy Prime Minister, to introduce him to the officer in charge of the Police District ('the OCPD') of Brickfields.

[8] As the first respondent was tasked with the duty of patrolling the area where Baginda's house was located, DSP Musa requested the first respondent to meet Baginda (p 5626 exh 436). This, the first respondent did, and Baginda met him. Baginda informed the first respondent that the deceased stayed at Hotel Malaya, Kuala Lumpur and gave him her room number (see P80A). The first respondent, having requested the second respondent to assist him, together went to Hotel Malaya on 18 October 2006. They went immediately to the eighth floor where the deceased's room was located. Nothing came out of that visit except that for their images were caught on the CCTV system, tendered as P48A-H, and accepted by the trial judge.

[9] At that material time, the first and second respondents were members of the *Unit Tindakan Khas* ('UTK') or the Special Action Unit of the Royal Malaysian Police at Bukit Aman, Kuala Lumpur with the rank of inspector and corporal respectively with the first respondent being the senior officer.

[10] On 19 October 2006 the deceased went alone to Baginda's house where she met PW1. PW1 had earlier been instructed to stall her until the police came. Soon after, the respondents together with 'PW7' arrived in her car. From the evidence of PW7 (see p 345 of *Jld* 2d) she went with the first respondent to Baginda's house after 8.10pm. Incidentally PW7 was the first respondent's girlfriend. On arrival at Baginda's house, PW1 who was standing next to the deceased, saw the first respondent alighting. The first respondent then approached the deceased, and after a brief conversation, left together with her, the second respondent and PW7 in PW7's car. That was the last time that PW1 saw the deceased. From PW7's evidence, chronologically after leaving Baginda's house they ended up at Bukit Aman, at which place she left the respondents together with the deceased. The deceased died that same night or early part of the morning of 20 October 2006 at the place as stated in the charge.

[11] On 20 October 2006, after realising that the deceased was missing PW3 lodged a missing person police report. The investigation officer (PW75), on instruction, initiated a kidnapping investigation. On 1 November 2006, the first respondent after being identified by PW1 as the person who took away the 'Chinese woman' was arrested. A mobile telephone together with three SIM cards were seized from the first respondent. The next person to be picked up in the course of the investigation was PW7.

[12] On 6 November 2006 the second respondent was arrested. Evidence was adduced by the prosecution to establish the additional piece of evidence that the first respondent led the police to discover the scene of the crime; separately and independently the second respondent also led the police to the same spot. The scene of the crime was a forest area of Puncak Alam, Selangor located within Lots No 12843 and 16735, Bukit Raja, Petaling. There the police discovered fragments of human bone, hair and tissue. A DNA analysis established that the remains were that of the deceased, with the cause of death being 'probable blast related injuries', as testified by the forensic pathologist ('PW70').

[13] The investigation did not end there. As stated earlier, the police also obtained footage of the images of both the respondents being caught on the CCTV system (P48A-H) of Hotel Malaya ie the hotel where the deceased stayed. From the first respondent's possession was discovered a note (P80A) written by Baginda on which was written the room number of the deceased.

[14] Investigation was carried out on call logs from the mobile telephone seized from the first respondent, showing the telephonic contacts of the first respondent and his traceable position and movement from Baginda's house to Bukit Aman, and thereafter to Puncak Alam.

[15] The second respondent also supplied information that led to the discovery of jewellery (earring, watch and ring) belonging to the deceased, in his black jacket, in his house. Again this damning piece of evidence would not have been discovered from his jacket had that specific information not come from him. Such expensive items belonging to the deceased could not have been in possession of the second respondent, in his house, unless they were taken away from her without permission. He had no business keeping them. The DNA analysis of the jewellery confirmed them to belong to the deceased.

[16] A smart tag device with a Touch & Go card was found in the second respondent's car. The record of its usage was tendered in order to show the movement of the second respondent on the night when the deceased disappeared. The record showed that the second respondent's car entered through the Kota Damansara Toll Plaza at 9.57pm and exited Jalan Duta Toll Plaza at 12.01am on 20 October 2006 (p 1407 *Jld* 2m).

[17] The police also found a pair of slippers (exh 153C) smudged with blood stain in the second respondent's car which held the presence of the deceased's DNA. A spent cartridge (exh P185B) was also recovered from the car.

[18] In the midst of the prosecution's case the first respondent tendered his alibi notice (D430) which was served on the appellant on 24 May 2007. Under s 402A of the Criminal Procedure Code (pre-amendment), where an accused person seeks to put forward a plea of alibi, evidence in support of it shall not be admitted unless at least ten days before the commencement of the trial a notice in writing of that intended plea was served on the public prosecutor. By serving the notice he thus had complied with a statutory requirement, and in the event his defence were called, no suggestion of mere denial or afterthought of this plea could be alleged.

[19] As the prosecution must establish a prima facie case before the defence is called, the introduction of a mere notice at that stage may not cause much harm or difficulty to the prosecution's effort but not if that notice has the backing of cogent and admissible evidence. That backing could come from the prosecution's own evidence. Sir John Woodroffe and Syed Amir Ali's *Law of Evidence* (17th Ed), had occasion to author that, 'The onus of proving a plea of alibi can be spelt out from the prosecution evidence ...' (see *Criminal Trial Advocacy for the Defence* by Hisyam Abdullah @ Teh Poh Teik).

[20] In this case the first respondent did just that ie supporting his notice of alibi with the pre-emptive tendering of the entry in the station diary (D428) of the Bukit Aman's UTL control room, through a prosecution witness (PW75). In a gist D428 was supposed to establish the plea that on 19 October 2006 he was at Bukit Aman and not at Puncak Alam ie the scene of the murder.

[21] The appellant on the other hand submitted that, unless D428 is proved by the maker, it would fail to impair the prosecution's attempt to establish a prima facie case. Needless to say, if the respondents succeeded in preventing the prosecution from establishing a prima facie case, the court must acquit the respondents (s 173(h) of the Criminal Procedure Code; *Public Prosecutor v Mohd Radzi bin Abu Bakar* [2005] 6 MLJ 393; *Public Prosecutor v Mohd Aszzid Abdullah* [2008] 1 MLJ 281).

[22] The notes of proceedings confirmed that despite having marked the entry as D428 through PW75, the trial judge in no uncertain terms said that it was still subject to proof (p 3351 *Jld* 2ae). In a word the maker must be called to prove the contents. The trial judge said:

> In conclusion, the station diary although only an extract copy but since it is conceded by the prosecution to be a certified copy of the original, is therefore admitted as the defence exhibit but contents of them will be considered subject to proof. ID (D)428 is marked D428.

[23] From the notes of proceedings there is no dispute that the truth of D428 was never proved at the prosecution's stage. Without any evidence to back up the alibi notice, and further contradicted by the call logs, the notice remained unsupported. The first respondent had thus failed to create a reasonable doubt on the prosecution's case.

[24] Considering the evidence, the big picture established by the prosecution shortly prior to the murder of the deceased is as follows. After PW7 had left the two respondents, the last time anyone saw the deceased alive, the respondents together with the deceased, using the second respondent's car, drove away from Bukit Aman towards Puncak Alam. They took the route of Bukit Aman and the Kota Damansara Toll Plazas (as established by the records of the Touch & Go card) and from there to the crime scene at Puncak Alam. The records showed the second respondent's car passing through those entry and exit points on 19 October 2006 at 9.57pm.

[25] The call logs (P27, P370 and P372B), also confirmed them to be at the area of the scene of crime at about the same time and date as per the charge, and not at Wangsa Maju or the office of IPK Bukit Aman. With D428 left unproved the notice of alibi on its own was of no help to the first respondent. No evidential weight could be attached to it.

[26] The cumulative effect of the entire circumstantial evidence was that having given the evidence adduced by the appellant the maximum evaluation the trial judge was satisfied that a prima facie case had been successfully established by the prosecution at the end of its case. Having scrutinised the evidence adduced by the prosecution and the finding of the trial judge, we find that the finding of the prima facie case and calling of the respondents' defences, safe. The acquittal of Baginda at the end of the prosecution's stage is of no concern to us as no appeal had been filed against that acquittal.

[27] It is settled law that come the defence stage it is up to an accused person to rebut the prima facie case adduced by the prosecution by merely casting a reasonable doubt (*Public Prosecutor v Saimin & Ors* [1971] 2 MLJ 16). How he goes about casting that reasonable doubt is left to him.

[28] In the circumstances of the case, as the first respondent wanted the court to believe that he was somewhere else the burden therefore was upon him to establish that relevant fact. As to why the second respondent preferred to give an unsworn statement is irrelevant to the trial judge or even us. The focus of the trial judge is only the content and weight attached to that unsworn statement. The second respondent was entirely within his legal rights when he elected to make an unsworn statement, but in a case which must in the event depend on credibility he took it at his own peril (see *Udayar Alagan & Ors v Public Prosecutor* [1962] 1 MLJ 39 (CA)). As the second respondent's demeanour could not be gauged, let alone the statement escaped any vigorous cross-examination by the prosecution or could not be tested against the evidence adduced by the prosecution, it is no small wonder that the trial judge refused to attach any weight to his unsworn statement.

[29] Even though it is incumbent upon the prosecution to prove its case, the legal requirement is on the premise of beyond reasonable doubt, and not beyond a shadow of a doubt (*Miller v Minister of Pensions* [1947] 2 All ER 372). As it were, at the end of the trial the respondents were found guilty and accordingly convicted.

[30] In essence, the appellant's main dissatisfaction with the Court of Appeal's reasoning for overturning the High Court's decision may be summarised in this manner. The Court of Appeal erred when:

(a) it accepted the entry in the station diary (D428) as admissible. (It misdirected itself of the facts relating to its veracity and treating it as valid. The error was compounded when the Court of Appeal placed a burden on the appellant to disprove D428);

(b) it rejected P27, P370 and 372B. (The appellant submitted that the Court of Appeal failed to appreciate that PW61 (Mohd Firdaous bin

Mohd Omar), PW62 (Syed Mustaqim bin Syed Yusoff) and 'PW63' (Haizal bin Hanbali) did provide full explanation and corroboration to the initial errors with respect to the date and time of P370. They were in a position to explain and were '… responsible for the management of the operation of the computer or for the conduct of the activities for which that computer was used' as set-out under s 90A(2) of the Evidence Act 1950);

(c) it failed to appreciate the cogency of the evidence tendered pursuant to s 27 of the Evidence Act 1950;

(d) an adverse inference was drawn under s 114(g) of the Evidence Act 1950 against the appellant in not calling DSP Musa Safri as a witness whence he did not play a major role in this case;

(e) it failed to give weight to the evidence of blood stain on the slippers found in the second respondent's vehicle;

(f) it failed to find the ingredient of common intention; and

(g) erred in not invoking the proviso to s 60(1) of the Courts of Judicature Act 1964.

[31] The appellant ventilated to us that based on the evidence, oral and documentary, though circumstantial, it had successfully made out the charge of murder against both the respondents beyond reasonable doubt and prayed that the appeal be allowed.

SUBMISSION OF THE RESPONDENTS IN A NUTSHELL

[32] The first respondent in his reply reiterated his non-involvement with the murder and repeated his defence as submitted at the High Court. He submitted that he only took the deceased to Bukit Aman, and after handing over the deceased to the second respondent, his involvement in this case ended. The first respondent adverted to his alibi plea by alluding to the notice (D430) served on the appellant on 24 May 2007, and supported by D428 (indicating the physical impossibility to commit the crime). There was no denial by the first respondent that he did not call the maker of the entry in the station diary be it at the prosecution or defence stage thus leaving the entry unproved.

[33] The first respondent also denied leading the police to the scene of crime and claimed that he was led there instead.

[34] Before us the second respondent again fell back on his unsworn statement given from the dock and likewise denied involvement in the murder of the deceased. Even though he admitted being present when the deceased was picked up at Baginda's house on 19 October 2006, his involvement ceased

A when he was asked to leave PW7's car, a little distance away from that house. He did not even support the story as alleged by the first respondent regarding the handing over of the deceased to him at Bukit Aman. He denied giving any information to the police that led to the discovery of the jewellery or the scene of crime. In short, he claimed that he was being made a scapegoat.

B

OUR ANALYSIS AND VIEW OF THE ALLEGED ERRORS OF THE COURT OF APPEAL

Admissibility of the unproved D428 (entry in the station diary)

C

[35] As the issue of D428 is relevant to the plea of alibi which was invoked by the first respondent a need arises for us to discuss the concept of alibi first. *Sarkar on Evidence ((15th Ed), p 28)* states that the word 'alibi' is of Latin origin and means 'elsewhere'. By claiming he was elsewhere he would thus be D physically incapable of committing the offence he is charged with. As mere assertion of alibi is insufficient to exculpate himself he thus must adduce credible evidence that can cast a reasonable doubt over the prosecution's case, evidence that must include particulars of the place where he claimed he was at the time of the commission of the offence. E

[36] In Malaysia this plea of alibi, which is more a rule of evidence rather than a defence in the normal sense, together with the burden placed on the person who asserts that he was elsewhere, can be found in the Evidence Act F 1950. Section 11 provides that facts not otherwise relevant are relevant if they are inconsistent with any fact in issue or relevant fact or if by themselves or in connection with other facts they make the existence or non-existence of any fact in issue or a relevant fact highly probable or improbable. Under illustration (a), whether A committed a crime on a certain day and the fact that he was G somewhere else, is relevant. Therefore if an accused person, in this case the first respondent, states that he was somewhere else ie he was not at the scene of crime that inconsistent fact is relevant. If successful in establishing his alibi his acquittal should be assured as he could not have committed a crime when he was physically away from the scene of crime. H

[37] The burden of proving the commission of an offence by an accused person never shifts away from the prosecution whilst the burden of establishing that defence of alibi lies on the accused person.

I

[38] Mere service of a notice of alibi on the prosecution is not sufficient to substantiate the truth of such notice even though an accused person does not assume the burden of proving its truth. The burden is still on the prosecution to prove its falsity by evidentially establishing the presence of the accused

person of having been at the scene of the crime at the material time. The falsity of that notice will crystalise once the prosecution successfully establishes a prima facie case.

[39] As said above, if the prosecution fails to establish a prima facie case then the need by the accused person to prove his alibi defence does not arise; but once the prosecution discharges his prosecutorial burden of proof that led to the establishment of the prima facie case, it then becomes incumbent upon the accused person to cast a reasonable doubt that he was elsewhere (*Gurcharan Singh & Anor v State of Punjab* AIR 1956 SC 460; *Dato Mokhtar bin Hashim & Anor v Public Prosecutor* [1983] 2 MLJ 232; [1983] CLJ (Rep) 101). This is a heavy burden on the first respondent and that burden flows from s 103 of the Evidence Act 1950 (*Juahir bin Sadikon v Perbadanan Kemajuan Ekonomi Negeri Johor* [1996] 3 MLJ 627). Section 103 reads:

> 103 The burden of proof as to any particular fact lies on that person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person.
>
> ILLUSTRATIONS
>
> (a) ...
>
> (b) B wishes the court to believe that at the time in question he was elsewhere. He must prove it.

[40] With the passage of time the above rule of evidence, now universally termed 'alibi', is conveniently referred to by law practitioners as 'defence of alibi' (*Jayantibhai Bhenkarbhai v State of Gujarat* (SC of India) Appeal (Crl) 555 of 2001). In this case, the first respondent when alluding to the defence of alibi, and relying greatly on D428 took the risk of putting all his eggs in one basket. He could not have been unaware that such a defence is fraught with danger. He could not at his whims and fancies at the defence stage introduce or advance an alternative defence, as such an approach would militate against the rule that an accused person must put forward his defence at the earliest possible opportunity. This rule avoids any suggestion of afterthought apart from preventing any element of surprise befalling the prosecution.

[41] As D428 was tendered at the prosecution's stage, our discussion of this exhibit must begin from that stage ie before the defence was called. As the first respondent had tendered two exhibits at the prosecution stage viz D430 and D428, and perhaps inadvertently diluting the prosecution's case, and unless this advance defence is neutralised the prosecutor may have a difficulty in establishing a prima facie case. The purpose of the D428 was to establish the first respondent's defence that on 19 October 2006 at 10.18pm he was at IPK Bukit Aman, and only left at 10.20pm on account of an escort duty of the then Deputy Prime Minister, Dato' Seri Najib Razak in Putrajaya. The notice of

A alibi states that he went to Section 4 Wangsa Maju at around 10.25pm until 11.45pm and at about 11.45pm to 12.20am (the next day) he was at Bukit Aman. He left Bukit Aman at 12.20am and reached Putrajaya at 1am. In other words at the material time he was never at Puncak Alam ie the scene of the crime.

B

[42] The entry (D428) reads as follows:

> 19/10/06 2218 — C/Insp Azilah ambil senjata Glock EAH 387 dan 2 magazine Glock, keadaan baik.
>
> C 19/10/06 2220 — C/Insp Azilah berlepas ke Putrajaya untuk tugas eskot Timbalan Perdana Menteri.

[43] On this issue, the Court of Appeal had faulted the trial judge for not D addressing his mind on D428, an entry which showed the first respondent collecting a glock at 10.18pm at Bukit Aman. The Court of Appeal also found that the investigating officer PW75 had testified that D428 was a true and an accurate record as provided for under s 97 of the Police Act 1967. And the Court of Appeal accepted its admissibility hence disagreeing with the trial E judge as regards this exhibit.

[44] In order to discuss the admissibility of D428 a need arises to reproduce s 97 of the Police Act 1967. It reads:

> F 97 The Inspector General may issue administrative orders, to be called 'Standing Orders', not inconsistent with this Act or rules or Police Regulations made thereunder, for the general control, direction and information of the Force and all bodies established or raised for police duties under this Act.

G **[45]** D428 is an entry from the station diary as confirmed by PW75 pursuant to the above provision. Counsel for the first respondent submitted that the entry was admissible and had relied on the case of *Dato Mokhtar bin Hashim & Anor v Public Prosecutor* [1983] 2 MLJ 232; [1983] CLJ (Rep) 101 to support his proposition. Having perused that case, despite such an entry being part of a public document, it was not automatically accepted as H admissible (as opposed to the lock up register). In that case Inspector Aziz had come forward to testify that he was the maker and also confirming the truth of the fact entered. In the current case that additional step is wanting ie nobody came forward to prove its authenticity.

I **[46]** Now on the law pertaining to the first respondent's failure to call the maker. In *Allied Bank (Malaysia) Bhd v Yau Jiok Hua* [1998] 6 MLJ 1 the court at p 14 had remarked:

> It is settled law that where a document is sought to be proved in order to establish

the truth of the facts contained in it, *the maker has to be called* (see *R v Gillespie* (1967) 51 Cr App Rep 172; *R v Plumer* (1814) R & R 264: *Hill v Baxter* [1958] 1 QB 277; *R v Moghal* (1977) Crim LR 373). Non-compliance with this rule will result in the contents of the documents being hearsay. The evidential effect of a document which has not been properly proved was described by Abdoolcader J (as he then was) in *Public Prosecutor v Datuk Haji Harun bin Haji Idris & Ors* [1977] 1 MLJ 180 at p 183 in the following terms:

> It is necessary to refer to certain exhibits which have been put in the course of these proceedings for identification but have not in fact been proved as they should have been and are accordingly not exhibits in the strict sense and cannot therefore form part of the record in this case, namely, D41 and D43 which were both put in for identification only and which are the audited accounts and annual report of the bank for the years 1973–1974 and 1972 respectively. As these two exhibits have not been proved and properly admitted as such, they must in the ultimate analysis be discounted and I shall accordingly disregard references to them and also all oral testimony as well adduced in relation thereto ...
> (Emphasis added.)

[47] The Court of Appeal in the case of *Dato' Seri Anwar bin Ibrahim v Public Prosecutor* [2004] 1 MLJ 177 also had occasion to say at p 240:

> It should also be noted that it was the defence that wanted the learned trial judge to accept the fact that the defence of alibi prevailed. Hence, it should therefore be for the defence to establish it so as to cast reasonable doubt on the prosecution's case and *not for the prosecution to disprove once a mere assertion has been made*. Section 103 of the Evidence Act 1950 is relevant. (Emphasis added.)

[48] Suffice if we state that we are unable to agree with the Court of Appeal's view that D428 is admissible per se and already proved. We hold that PW75's opinion of the statutory requirement of the station diary, and his confirmation of the similarity of D428 (it being a copy) with the original station diary entry, did not necessarily establish the truth of its contents. He was never the maker of the entry. Only the maker could confirm the truth of the entry and unless proven by the maker the contents of D428 remains hearsay.

[49] With only a notice of alibi and an unproved D428 to fall back on, as opposed to the prosecution's water tight case, it was no surprise that a prima facie case was established.

Admissibility of the call logs (P27, P370 and P372B) and the effect of the unproved D428 over them

[50] In the course of the police investigation the police had seized the first respondent's mobile telephone (0193636153). In order to pin-point his

whereabouts on the date and time of the murder the police sought the assistance of Celcom. From the technical assistance of Celcom, the police would know if the said mobile telephone had been used, when and where. Celcom witnesses produced bills etc of the calls and the print outs of the calls are referred to as call logs (P27, P370, P372B).

[51] We now discuss the witnesses who produced them in court. We begin with PW61. He is an internal investigator of Celcom and is authorised to produce and print Celcom's clients' information and bills when required by any authority. He also has access to all systems in Celcom for paid and prepaid. On 31 October 2006 PW61 received a few requests from the police to produce and print a detailed bill of mobile phone number 0193636153 (owned by the first respondent) for the period of 1–31 October 2006, one of them produced by him being P27. He prepared and arranged P27. Not only did he personally operate the computer which was under his care but also adduced an unnecessary affidavit to confirm so. This P27 was processed by PW61 personally from raw data (P370) received by e-mail from Mr Syed Mustaqim bin Syed Yusoff ('PW62'). P27 showed the following:

> 10/19/2006 — 22:15:51 — C_PEKANSUBANG
>
> 10/19/2006 — 22:19:33 — C_KGMELAYUSBG
>
> 10/19/2006 — 22:43:06 — PUNCAKALAMHWY4
>
> 10/19/2006 — 23:16:46 — PUNCAKALAMHWY4.

[52] In a nutshell as explained by PW61, P27 showed that on 19 October 2006 a call was made from the mobile phone 0193636153 at about 10.15pm at Pekan Subang; another call was made at about 10.19pm at Kg Melayu; and two calls made at Puncak Alam at about 10.43pm and 11.16pm. It is common knowledge that Pekan Subang and Kg Melayu are close by to Puncak Alam, and quite a distance from Bukit Aman.

[53] PW62 confirmed that raw data would initially come from the Mobile Switching Centre ('the MSC') which would later be sent to the Mediation System. Having received that raw data in that Mediation System he had programmed the data into P370, and thereafter had sent them not only to PW61, but also to PW63. PW62 evinced that he was in charge of the Mediation System and stated that P370 was a complete record of the transaction of 0193636153 (p 2434 RR *Jld* 2w). When asked as regards P27's authenticity, sourced from P370, and produced by PW61, PW62 said:

> Setelah ditunjukkan P27 kepada saya, saya juga tidak meneliti isi kandungannya. Tetapi saya tahu bahawa P27 adalah mengandungi data-data yang terkandung dalam P370 kerana En Firdaous menunjukkan kepada saya dan mengatakan inilah data-data untuk 0193636153.

[54] We now touch on PW63's evidence. He is a university graduate of UiTM and has a Degree in Electrical Engineering, employed by Celcom as a technical specialist, to plan and develop for the DG System for its transmitting system. He explained the data relating to site name, Location Area Code ('the LAC'), Cell ID service area code, scrambling code, frequency, etc. He confirmed that he received P370 from PW62 and thereafter prepared and produced P372B with certain minor modifications by switching the header of two columns, namely columns six and seven. He received P370 through his own computer and thereafter produced P372B from that same computer (RR 2523 *Jld* 2x). That computer was in good order. He confirmed that the 'value' of P27, P370 and P372B were similar (*Jld* 2xp 2567).

[55] PW63 also testified that based on the value of Location Area Code (the LAC) and Cell ID, any transaction, either outgoing or incoming, would indicate the whereabouts of the caller, in this case the first respondent as reflected from his mobile telephone. The LAC would indicate the general location of a call whilst the Cell ID would indicate the exact location of the transmitting station thus pinpointing the call spot. With PW63's explanation of P372B drawn from P27, the transactions recorded on 19 October 2006 showed that calls took place on 22:43:06 (10.43pm) and 23:16:46 (11.16pm) at Puncak Alam.

[56] PW63, apart from retrieving and personally preparing P372B from his own computer, had taken the extra mile of conducting a test drive in order to identify the best serving base station. He, together with PW75, and another police personnel, had shown and identified the location of the relevant transmitting station relevant to P372B. He even did a demo as to how he could ascertain the location of the transmitting station which would capture his demo call. He went to Bukit Aman and after making test calls showed that any calls from that site would originate and indicate the transmitting station as Bukit Aman. These demo test calls were additional oral evidence over and above that of P372B to establish that no calls were transmitted from Bukit Aman and Wangsa Maju at the time of the murder from the first respondent's mobile phone.

[57] A further perusal of P27 shows a transaction having taken place at 23:26:53 (11.26pm) on 19 October 2006 at BKTASMARA, with the first respondent finally returning to BUKIT_AMAN at 12.25am.

[58] Our final conclusion is that the above neutral information of P27, P370 and P372B affirmatively pin-pointed the date, time and place of the caller ie the first respondent every time he made a call. From the analysis of the information as supplied by PW61, PW62 and PW63, not only are we aware of the communications made by the first respondent, but also his last position ie

Puncak Alam, after PW7 left them at Bukit Aman. What was obvious too was that none of the calls made by the first respondent, when using mobile phone 0193636153, were detected from Wangsa Maju or Bukit Aman during the material time. The demo carried out by PW63 merely reconfirmed the call logs. It is common knowledge that the distance between Wangsa Maju/Bukit Aman to Puncak Alam ie the scene of the murder is very far apart. In short, the respondents could not have been anywhere else except at those places as indicated by the call logs ie Puncak Alam.

[59] Under s 114(f) of the Evidence Act 1950 the court may presume that the common course of business has been followed in the case of the Mobile Switching Centre (the MSC). Without any evidence to the contrary we take it that the raw data in the MSC had been stored, maintained and operated properly. As regards the value of the call logs there is no evidence to show that the call logs had been tampered with or had been successfully discredited by the respondents. It must also be emphasised that a technical piece of evidence that is difficult to be understood, is not sufficient ground for it to be rejected, let alone declared as not creditworthy.

[60] Section 90A(2) of the Evidence Act demands certain conditions to be complied with, to enable the documents produced by a computer and of statements contained therein, to be admissible. For easy reference we reproduce this provision, which reads:

> 90A(1) In any criminal or civil proceeding a document produced by a computer, or a statement contained in such document, shall be admissible as evidence of any fact stated therein if the document was produced by the computer in the course of its ordinary use, whether or not the person tendering the same is the maker of such document or statement.
>
> (2) For the purposes of this section it may be proved that a document was produced by a computer in the course of its ordinary use by tendering to the court a certificate signed by a person who either before or after the production of the document by the computer is responsible for the management of the operation of that computer, or for the conduct of the activities for which that computer was used.

[61] In *Gnanasegaran a/l Pararajasingam v Public Prosecutor* [1997] 3 MLJ 1, the Court of Appeal held as follows:

> Section 90A of the Evidence Act 1950 makes computerised records made in the course of its ordinary use admissible if the following is proven, ie that: (i) the documents were produced by a computer; and (ii) the computer records are produced in the course of its ordinary use. Proof can either be by a certificate signed by someone solely in charge of the computer which produced the printout as required by s 90A(2), or by an officer of the bank. In this case, Zainal was able to testify with regard to the documents because he was in charge of the operations of current accounts.

That decision was followed by the Federal Court in *Ahmad Najib bin Aris v Public Prosecutor* [2009] 2 MLJ 613.

[62] In this case, the call logs were produced by computers in the course of their ordinary use by the very makers, namely PW61, PW62 and PW63 hence dispensing with the requirements of tendering to the court signed certificates that they were responsible for the management of the operation of the computers, or for the conduct of the activities for which those computers were used for. The need to adduce the certificates as required by s 90A(2) of the Evidence Act 1950 had thus become redundant.

[63] With no weight attachable on D428 by no stretch of the imagination could it cast any reasonable doubt on the unimpeachable P27, P370 and P372B. The assertion of the first respondent that he was at Bukit Aman, collecting a glock at 10.18pm and then leaving Bukit Aman for Putrajaya at 10.20pm was without any corroboration. With the call logs being admissible, and making short shrift of the unproved D428, the alibi defence is no better than a mere denial of the murder accusation.

Section 27 information of the Evidence Act 1950

[64] In the instant case the appellant also relied on the s 27 information to prove that both the respondents had knowledge of the location of the crime scene. Evidence was adduced to show that they had led the police team to discover the remains of the deceased. Section 27 of the Evidence Act 1950 provides:

> When any fact is deposed to as discovered in consequence of information received from a person accused of any offence in the custody of a police officer, so much of that information, whether the information amounts to a confession or not, as relates distinctly to the fact thereby discovered may be proved.

[65] The trial judge had accepted the admissibility of the statements made under s 27 of the Evidence Act 1950 from the first respondent, on the premise that there was no reason to doubt the credibility and reliability of the evidence of C/Inspector Koh Fei Cheow ('PW20'). Further, PW20 had no prior knowledge of the location of the scene of crime.

[66] The Court of Appeal on the other hand held that there was doubt as to whether the information leading to discovery was in fact given by the first respondent. The Court of Appeal found contradictions between what was said by the first respondent as to the location of the scene of the crime after comparing PW20's testimony in court and his police report (P62).

[67] There was also alleged material contradictions and inconsistencies in the evidence given by PW20 and DSP Zainudin bin Abdul Samad ('PW21'). PW20 had testified that the first respondent showed to the police the place where the Mongolian girl was blown up first before proceeding to point where the girl was shot. PW21 on the other hand testified that PW20, the first respondent, and the police escort went to the area where the Mongolian girl was shot first, before proceeding to where she was blown up. The only difference was the sequence.

[68] The other contradiction was as regards the exact evidence given by 'PW29', PW21 and PW75 and what the first respondent actually showed to the police team at the crime scene. The respondents submitted that as the accuracy of the s 27 information was being challenged it thus should be rejected. On this issue the case of *Pang Chee Meng v Public Prosecutor* [1992] 1 MLJ 137 was referred to, where Abdul Hamid LP said at pp 140–141:

> While this section, an exception to other laws in the particular respect, is very useful to the detection of crimes, the founding fathers of jurisprudential textbooks on the Indian Evidence Act which is in pari materia with our Ordinance, have emphasised on the question of discovery that 's 27' has frequently been misused by the police and the courts should be vigilant about the circumvention of its provisions. The protection afforded by the wholesome provisions of ss 25 and 26 may sometimes be whittled down by the police by their ingenuity to get the information given by the accused recorded in the case diary in a way it would appear that it led to discovery of some facts although the police might have made such discovery from other sources. We are not suggesting that the practice by the local police is the same as in India, nevertheless, we are firmly of the view that in invoking s 27, the courts should be very vigilant to ensure the credibility of evidence by the police personnel in respect of this section, which is so vulnerable to abuse.

[69] The Supreme Court also opined that:

> ... while the precise question put to the appellant is evidence, the true substance of the information given by the appellant is not altogether clear in light of the contradictions inherent in the prosecution evidence.

[70] Apart from the alleged contradictions of the testimony of the prosecution's witnesses here, the first respondent also alleged that the police had prior knowledge of the crime scene before enlightened by him. The first respondent submitted that the forensic team led by Supt Amidon ('PW58') was already at UiTM Puncak Alam even before the first respondent took them to the scene. In a gist the police already had prior knowledge of the scene from some other sources implying that the entire s 27 information leading to discovery was staged and fabricated.

[71] On this point, *Francis Antonysamy v Public Prosecutor* [2005] 3 MLJ

389; [2005] 2 CLJ 481 when quoting *Public Prosecutor v Hashim bin Hanafi* [2002] 4 MLJ 176 had occasion to remark:

> It follows that prior knowledge which will make s 27 inapplicable must be of such a nature that it must be capable on its own of leading to the discovery of the object. If it does not have that effect then the cause of the discovery will still be the information supplied by the accused and not the prior knowledge of the police. In that event, the information supplied by the accused will be admissible as the information that the police have will not amount to prior knowledge.

[72] The defence counsel also referred to the Supreme Court case of *Pang Chee Meng v Public Prosecutor* in particular the following remarks made by the Lord President Tun Abdul Hamid:

> In invoking s 27 of the Evidence Act 1950 the courts should be very vigilant to ensure the credibility of the evidence by the police personnel in respect of the section, which is so vulnerable to abuse.

[73] The other case for our consideration is *Krishna Rao Gurumurthi & Anor v Public Prosecutor & Another Appeal* [2007] 4 CLJ 643, where the court also followed the principles enunciated above. The court remarked that:

> The way in which s 27 of the Evidence Act should be approached has been fairly worked out in the many decided case that have discussed it. There are so many that it is neither feasible nor desirable to discuss them all here. But the common thread that runs through all of them is clear enough. It is that the section-like so many other areas in the law of evidence-rests on the twin pillars of reliability and accuracy.
>
> Accordingly, the first question that a court must ask itself is this: Did the accused ever make a discovery statement? This turns on the credibility of the policeman who gives evidence of the discovery statement. If the court is satisfied that the first question must be answered in the negative, that is to say that the alleged statement is a fabrication, then that is the end of the matter and no further steps in the inquiry are necessary. But if the court decides that the first question should receive an affirmative response, then it must ask itself the second question. Is the version of the discovery statement put forward by the policeman giving evidence of it accurate enough to be acted upon? If the accuracy of the statement is in doubt then it should be rejected. Otherwise it should be accepted.

[74] Before commenting on the submission of the first respondent as regards the contradictions, let us examine first the recent Federal Court's case of *Siew Yoke Keong v Public Prosecutor* [2013] 3 MLJ 630; [2013] 4 CLJ 149. In this case it was held that any information to be admissible under s 27 of the Evidence Act would include the accused's statement, his act or conduct, such as pointing out, which led to the discovery of a fact. For such information to be admissible no duty is placed on the prosecution to prove its voluntariness thus dispensing with the requirement of a trial within a trial. We see no reason to depart from the above ruling.

[75] We are of the considered view that the correct test was applied in *Public Prosecutor v Krishna Rao a/l Gurumurthi & Ors* [2000] 1 MLJ 274, as applied in *Chong Soon Koy v Public Prosecutor* [1977] 2 MLJ 78 when Suffian LP formulated a two questions test, viz:

(a) what was the fact discovered?; and

(b) what was the information supplied by the accused relating distinctly to the facts thereby discovered?.

[76] The above two questions tests indicate that the focus is on the supplied fact discovered and not on the extraneous factors to make the information acceptable. Applying the above test to the current case, (as opposed to the first respondent's position), the prosecution's version was that PW20 and PW21 were taken by him to the scene. The first respondent never mentioned the word 'Puncak Alam' to PW20 and PW21 but had merely brought them to that location. The act of the first respondent pointing to the place where the deceased's remains were found amounted to information. That information was the distinct cause of the discovery of the remains of the deceased before the second respondent arrived with another set of officers. We observed that nowhere was it shown or established by the first respondent that the police already knew the exact location.

[77] Having considered the evidence of 'PW19', PW20, PW21, PW75 and PW58 we are satisfied that the police did not know the exact location of the scene of crime had it not been pointed out by the respondents. The second respondent's conduct of leading the police to the same scene of crime at Puncak Alam, separately and independently, merely strengthened the prosecution's case against the respondents. PW19 testified that he received information from PW75 that the second respondent had also agreed to show the location of the crime scene. And the second respondent brought the police to the same location as shown by the first respondent.

Discovery of the deceased's jewellery in the second respondent's black jacket in his house

[78] Information given by the second respondent also led to the discovery of jewellery belonging to the deceased found in the second respondent's jacket in his house. The DNA analysis carried out on the jewellery confirmed them to belong to the deceased. The second respondent had led ASP Zulkarnain ('PW23') and his team together with the Bomb Disposal Unit to his house at No 5-3-7, which was located at the third floor of a building. Guided by the second respondent PW23 used the key to open the padlock attached to the grill and the wooden door of the said house. PW23 testified that the second respondent led his team to his room and there took out a black jacket from the

cupboard in his room. While taking the said jacket out the second respondent told him, 'saya simpan barang kemas di dalam jacket'. Acting on this information PW23 went through the jacket and discovered a lady's wrist watch carrying the 'Larmens' brand engraved with the serial number of 940004B (P16B), a pair of earrings one of which was without a stud (P17B), and one gold ring (P18B). When PW23 asked the second respondent, 'Adakah ini barang-barang kemas yang dimaksudkan' the second respondent nodded his head, pointed his finger at the same items and said, 'inilah barang dia'.

[79] Counsel for the second respondent on the other hand contended that PW20 contradicted PW23 on the discovery of the said jewellery. The latter claimed that the second respondent said, '... sendiri keluarkan jacket tersebut dan memberitahu sesuatu kepada saya ... gambar diambil serentak semasa beliau menunjukkannya'. It was at this point that PW23 claimed that the second statement was made ie 'saya simpan barang kemas di dalam jacket'. Learned counsel for the second respondent also submitted that a police team had searched the second respondent's room before the jewellery were found.

[80] Notwithstanding the submissions of the second respondent, and having perused the evidence, we found no fault in the finding of the learned trial judge that the said jewellery were discovered in consequence of the said information supplied by the second respondent.

[81] Section 27 of the Evidence Act 1950 uses the word 'proved' and nothing should be excluded if the information were proved. In a word, the issue of discretion to exclude that information comes for consideration only after the prosecution has proved it.

[82] The second respondent here contended that the said information was procured in breach of the privilege against self-incrimination by not complying with s 112(2) and (4), and the information was procured in breach of the mandatory procedure to s 112(5). Therefore, it was argued by the defence that even assuming the information was procured, it was not procured by the mandatory adherence of law, resulting in unfairness to the second respondent, and as such the court ought to exercise its discretion to exclude it.

[83] The pertinent evidence highlighted by the respondents are as follows:

(a) despite PW23 claiming that he administered the s 113 caution he did not record a s 113 statement. He instead made a police report so that the second respondent would not have the opportunity to verify the statement;

(b) no evidence of the words of the caution were recorded in the police report (P76); and

(c) PW23 agreed in cross-examination that having delivered the caution, he could record a s 113 statement but failed to do so.

[84] Let us briefly look at case law again. In *Goi Ching Ang v Public Prosecutor* [1999] 1 MLJ 507, it was held that information supplied under s 27, which has been found to have been given involuntarily, may be excluded by the court in the exercise of its discretion. The Federal Court there quoted *Harris v Director Public Prosecutions* [1952] 1 All ER 1044, at p 1048 with approval, that '... in a criminal case, the judge always has a discretion to disallow evidence if the strict rules of admissibility would operate unfairly against an accused'.

[85] The Federal Court further held:

> Fairness requires fair trial which, in turn, needs fair procedure. Fair process requires that the legitimate interests of both the prosecution and the defence are adequately provided for. While the police ought to be given a reasonable opportunity to question suspects and accused persons, in its investigation, the accused must also be reasonably protected from the danger of extraction of unreliable statements and of statements (even if reliable) by some improper means. Evidence obtained in an oppressive manner by force or against the wishes of an accused or by trick or by conduct of which the police ought not to take advantage, would operate unfairly against the accused and should in the discretion of the court be rejected for admission. The court should ensure that the standards of propriety in obtaining s 27 information are scrupulously followed in the police station.
>
> Moreover, admitting the appellant's s 27 information would infringe the principle of the right against self-incrimination, there being no evidence of s 112(ii), (iii) and (iv) of the Criminal Procedure Code having been complied with.

[86] In *Francis Antonysamy* the Federal Court had agreed with *Goi Ching Ang v Public Prosecutor* that the information supplied under s 27, which has been found to be involuntary, may be excluded by the court in the exercise of its discretion. But the court there opined that as the exclusion of the evidence is discretionary the exercise of the discretion will depend on the facts of each case. The court there said:

> In my opinion the degree of involuntariness that can be said to be sufficient to exclude s 27 statement in the exercise of the discretion of the court must be balanced against the fact that involuntariness is not a condition of admissibility of such a statement. Therefore the circumstances of involuntariness must indeed be extraordinary in order to exclude a statement on a ground which, in the first place, does not affect its admissibility in law.

[87] In other words, not all s 27 statement will be excluded in all instances where it was supplied involuntarily. In the event it could be shown that the s 27

information obtained has an adverse effect on the fairness of the proceedings the learned judge could reject it. Again we have no reason to depart from that stance.

[88] Here the respondents had independently led the police to the scene of crime, which is a remote and isolated place and high up in the hills, where human remains were found at that place, subsequently proved to be that of the deceased. They are policemen from a special force unit and are expected not to be easily intimidated, let alone there is no evidence adduced by them of having been intimidated, induced or tortured in any form by the investigating team. From the evidence we find no reason to exclude the information in the exercise of our discretion. But it must be understood that, even had there been some form of untoward behaviour, that does not automatically mean the court must forthwith preclude that piece of evidence. We therefore find that the trial judge was right in not excluding the s 27 information as evidence.

[89] Despite the proved s 27 information no explanation or evidence was forthcoming from the second respondent as to how and why the jewellery that belonged to the deceased was found in his jacket in his house. Without any explanation his possession of the jewellery therefore must have been an unlawful one. His defence, which came in the form of an unsworn statement failed to account for those jewellery, as it merely stated that his involvement ended outside Baginda's house when he was asked to leave PW7's car. Under the illustrations of s 114(a) of the Evidence Act 1950:

> The court may presume —
>
> (a) that a man who is in possession of stolen goods soon after the theft is either the thief or has received the goods knowing them to be stolen, unless he can account for his possession; ...

[90] Matthew CJ in *Abdullah bin Saad v Public Prosecutor* [1956] 1 MLJ 92 at pp 92–93 had occasion to discuss the above statutory presumption in the following manner:

> ... *Wills in Circumstantial Evidence*, (7th Ed), p 104 has the following passage:
>
> The possession of stolen goods recently after the loss of them, may be indicative not merely of the offence of larceny, or of receiving with guilty knowledge, *but of any other more aggravated crime which has been connected with theft*. Upon an indictment for arson, proof that property which was in the house at the time it was burnt, was soon afterwards found in the possession of the prisoner, was held to raise presumption that he was present at, and concerned in, the offence; *R v Rockman* (1789) 2 East PC p 1035, and see *R v Fuller* (1816) R & R 308. *This particular fact of presumption commonly forms also a material element of evidence in cases of murder*; which special application of it has often been emphatically recognized. It is upon the same principle that a sudden and otherwise

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> inexplicable transition from a state of indigence and a consequent change of habits or a profuse or unwanted expenditure inconsistent with the position in life of the party, is sometimes a circumstance extremely unfavourable to the supposition of innocence (*R v Buddock*) (murder by poison) Bristol Assn Ap 1835, Cor: Sir Charles Wetherell, Recorder .... (Emphasis added.)

B

[91] It is noteworthy that in *Amathevelli a/p P Ramasamy v Public Prosecutor* [2009] 2 MLJ 367; [2009] AMR 281, Arifin Zakaria CJ (Malaya), as he then was, had occasion to discuss the above s 114(a) at p 294. The deceased there was wearing a gold chain at the time of her death but was found

C later in the possession of the appellant. This piece of jewellery was a material element to connect the appellant to the murder of the deceased, which was also supported by other evidence in the like of acid injury found on the appellant's lips and arm. Coincidentally the deceased also had acid injuries. The appellant failed to explain the possession of the gold chain. Ariffin Zakaria CJ (Malaya)

D stated:

> Similarly the presumption arising from s 114(a) of the Evidence Act also remains as the possession of the gold chain by the appellant has not been explained by her as required.

E

[92] At the end of the case Ariffin Zakaria CJ (Malaya) stated that the appellant had failed to raise any reasonable doubt in the prosecution's case. His Lordship remarked:

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> The appellant in her evidence did not offer any explanation whatsoever as to how she came to be in possession of the deceased's jewellery. It is our finding, therefore that both the trial judge and the Court of Appeal had rightly concluded that the circumstantial evidence before the court irresistibly points to the guilt of the appellant.

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[93] Similarly in the present case, the possession of the jewellery found in the jacket of the second respondent was not explained by the second respondent. Thus the above presumption must remain. The possession of the deceased's jewellery not only is indicative of the offence of theft or in possession of stolen property but of any other more aggravated crime, in this case the murder of the

H deceased. At the very least it raises the presumption that the second respondent was present at Puncak Alam (see above *R v Rockman* (1789) 2 East PC at p 1035, and see *R v Fuller* (1816) R & R 308). If no explanation is forthcoming the presumption then must remain and must pile up as further corroborative evidence to tie down the second respondent to the murder of the deceased.

I

Suppression of material evidence

[94] This subheading relates to the non-calling of DSP Musa and the non-tendering of the SMS messages between the latter and Baginda and the first respondent which found favour with the Court of Appeal. The respondents at the Court of Appeal had alleged that this failure amounted to suppression of evidence resulting in an abuse of process of the court which led to a mistrial. In this regard the respondents relied on the case of *Ti Chuee Hiang v Public Prosecutor* [1995] 2 MLJ 433; [1995] 3 CLJ 1, which emphasised that unfairness could not be cured by merely offering DSP Musa as a witness for the respondents. By analogy, in the above case the court at pp 440–441 (MLJ); at p 7 (CLJ) observed:

> We hasten to add ... it would not have sufficed for the prosecution to have merely made them available to the defence to be called as defence witnesses, as such a course would have put the defence to the disadvantage of not having been able to cross-examine them on any point on which they might support the prosecution case.

[95] By not calling DSP Musa the respondents were alleged to have been deprived of the opportunity to cross-examine him pertaining to the exculpatory contents of P436 ie the sworn affidavit by Baginda. This failure had resulted in extreme unfairness to them. The Court of Appeal agreed with this argument.

[96] Despite the above similar submission before us, we are satisfied that the contents of P436 are merely confirmatory in nature and at best useful to Baginda only. It merely confirmed the evidence adduced by PW3 and PW4 that Baginda had a previous relationship with the deceased, that he requested for help from DSP Musa, and affirmed generalised exculpatory remarks beneficial to himself. As there is no serious dispute about this relationship, we are therefore unable to see how much more details DSP Musa could produce that would contribute to the respondents' defences. The calling of DSP Musa, let alone the tendering of the SMS, would not have affected the evidence pertaining to Baginda's previous relationship one tiny bit. We also observed that DSP Musa never instructed the first respondent how to assist Baginda but merely was told to meet up with him; the first respondent thereafter had acted on his own discretion and sensibilities.

[97] We therefore conclude that the non-calling of DSP Musa or the non-tendering of all the alleged SMS had not in any way caused unfairness to the respondents. We fail to see how the presumption of adverse inference under s 114(g) of the Evidence Act 1950 could be applicable here.

Common intention under s 34 of the Penal Code

[98] Section 34 of the Penal Code provides that when a criminal act is done by several persons, in furtherance of the common intention of all, each of such persons is liable for that act in the same manner as if the act was done by him alone. The Supreme Court in *(1) Namasiyiam (2) Rajindran (3) Goh Chin Peng, and (4) Ng Ah Kiat v Public Prosecutor* [1987] 2 MLJ 336 at p 344 observed that:

> In law, common intention requires a prior meeting of the minds and presupposes some prior concert. Proof of holding the same intention or of sharing some other intention, is not enough. There must be proved either by direct or by circumstantial evidence that there was (a) a common intention to commit the very offence of which the accused persons are sought to be convicted and (b) participation in the commission of the intended offence in furtherance of that common intention.
>
> Where the prosecution case rests on circumstantial evidence, the circumstances which are proved must be such as necessarily lead only to that inference. Direct evidence of a prior plan to commit an offence is not necessary in every case because common intention may develop on the spot and without any long interval of time between it and the doing of the act commonly intended. In such a case, common intention may be inferred from the facts and circumstances of the case and the conduct of the accused (*The Supreme Court (of India) on Criminal Law 1950–1960* by JK Soonavala at pp 188–193).

[99] It is trite that when s 34 of the Penal Code is alluded to in a charge for murder, there is no requirement to prove who actually or ultimately caused the death of the deceased (*Ong Chee Hoe & Anor v Public Prosecutor* [1999] 4 SLR 688). In that case the court opined:

> In any case, the effect of invoking s 34 made it unnecessary to determine who exactly the actual doer of the offence in question was. In the Privy Council decision of *Barenda Kumar Ghosh v Emperor* AIR 1925 PC 1, the court stated:
>
> > Section 34 deals with the doing of separate acts, similar or diverse, by several persons; but if all are done in furtherance of a common intention, each person is liable for the result of them all, as if he had done them himself.

[100] The Court of Appeal in its judgment here when addressing the issue of s 34 had remarked the following:

> Except for the words 'individually and jointly' mentioned by the learned trial judge in para 154 of the grounds of judgment, nowhere else did the learned trial judge address the acts or conduct of the appellants or the circumstances that give rise to or prove the prearranged plan to bring about the murder of the deceased ... the absence of such finding by the learned trial judge on the ingredient of common intention amounted to a misdirection by way of non-direction (*Mahbub Shah*). In fact, there was no evaluation of the evidence on the ingredient of common intention based on

the principles as stated in *Lee Kwai Heong & Anor v Public Prosecutor* [2006] 1 CLJ 1043. A

[101] The respondents submitted before us that there was no evidence from which common intention under s 34 of the Penal Code could be inferred between them. Sifting through the evidence, counsel for the respondents canvassed, amongst others, that the records of the smart tag device, showing the movement of the second respondent's car entering and exiting Kota Damansara's Toll Plaza, did not establish the common intention between the second and first respondent. That was a neutral piece of evidence. Being at Hotel Malaya on 18 October 2006 merely confirmed that the deceased was staying at the hotel. Nothing more should be read into it. Being last seen with the deceased outside Baginda's residence at best merely shows opportunity for the respondents to commit the alleged crime. It was submitted that the gap between opportunity and common intention to commit the offence as per the charge was huge and wide. By no account, it was submitted, were the above pieces of evidence deducible to be common intention. B C D

[102] We hold the view that even if the trial judge had failed to mention of any evaluation of common intention in his written grounds of judgment, the Court of Appeal, which in law reheard the case when exercising its appellate function, was empowered and also duty bound to carry out an evaluation exercise to determine whether common intention did exist. Here the Court of Appeal equally failed to do that. An appeal is a continuation of proceedings by way of rehearing and an appeal court may subject the evidence to a critical re-examination (*Ahmad Najib bin Aris v Public Prosecutor* [2009] 2 MLJ 613; *Mohamad bin Deraman v Public Prosecutor* [2011] 3 MLJ 289). E F

[103] Let us look at the evidence before us that may show the existence of a common intention, if any, as envisaged under s 34 of the Penal Code between the respondents to commit murder, with particular emphasis on the respondents being together at a few places and at certain material time. G

[104] We start with the presence of both the respondents at Hotel Malaya on 18 October 2006, a fact caught on the hotel's CCTV security system as fortified by PW58 who forensically identified the two images as those of the two respondents. Next was the evidence of PW1, confirming the respondents' presence at Baginda's house on 19 October 2006, when the deceased was picked up in PW7's car. These pieces of evidence were never denied by both of them except that the first respondent testified that he handed the deceased over to the second respondent at Bukit Aman whilst the second respondent said he last saw the deceased with the first respondent outside Baginda's house. H I

[105] A relevant evidential question to be considered on the issue of common intention is whether the respondents had gone up the hills of Puncak Alam in the second respondents car and whether the car generally played a role in the establishment of their common intention.

[106] By establishing that the respondents were in the car together, and eventually ending up at Puncak Alam, not only provided them with time, space and opportunity to formulate the criminal act, but makes short shrift of the assertion of the first respondent that his involvement ended at Bukit Aman, and the second respondent's involvement ended outside Baginda's house.

[107] Sifting through the evidence, we find that the first respondent, when going to Baginda's house on 19 September drove PW7's car together with her. The respondents together with the deceased and PW7 thereafter returned to Bukit Aman. Initially the second respondent sat in PW7's car until they reached a junction where he alighted and switched over to his car, a Vitara (CAC 1883), to return to Bukit Aman. At no stage of the way, in this short episode, was there any mention made of a car owned by the first respondent by anyone. At Bukit Aman PW7 left the respondents with the deceased. As said earlier in this judgment (para 24), that was the last time the deceased was seen alive; and the deceased was with the respondents. The respondents adduced literally no evidence or explanation that could raise any doubt that they were the last persons to be with the deceased. How could they raise the doubts when the second respondent had testified that his role ended outside Baginda's house ie before reaching Bukit Aman whilst the first respondent merely stated that after handing over the deceased to the second respondent his role ended. The alleged handing over by the first respondent of the deceased at Bukit Aman merely confirmed the testimony of PW7 that the first respondent was one of the last two persons (apart from the second respondent) to be with the deceased, when she was alive.

[108] The second respondent's car was seen entering and exiting the Kota Damansara's toll plaza at 9.57pm as confirmed by the records of the Smart Tag device taken from the second respondent. These neutral evidence established the fact that the second respondent's car had entered and exited this toll plaza ie the natural route to Puncak Alam.

[109] The blood stained slipper found in the second respondent's car, and the discovery of jewellery in his jacket found in his house, could only lead to one irresistible conclusion ie that the second respondent retrieved them from the deceased at Puncak Alam. The slippers were left in the car whilst the jewellery kept in the house. And the vehicle to transport these items has to be the second respondent's car. Whether these exhibits were taken prior to the killing or

otherwise is irrelevant. What is important is that they were taken from the deceased, and to retrieve them, one has to be on that hill in the first place.

[110] With the call logs viz P27, P370 and P372B establishing that the first respondent had made calls from Puncak Alam the irresistible conclusion is that the first respondent was up the hills of Puncak Alam, with the second respondent.

[111] The second respondent's car has to be the very vehicle that was used to transport the respondents and the deceased to Puncak Alam.

[112] The final piece of evidence, like a jigsaw puzzle, is the information received by the police from the respondents, strengthened by them leading the police independently and separately to the scene of crime. By logical deduction they must have been there earlier in order to successfully and unerringly pin-point the location of the scene of crime; with the second respondent's car as the mode of transport. And all the evidence point to the respondents, not only having gone up the hills of Puncak Alam at one point of time, but had gone up with the second respondent's car.

[113] With the admissibility and truth of the call logs established it was obvious that the first respondent had lied about the alibi defence. His inclination to lie is seen again when he said he handed the deceased over to the second respondent at Bukit Aman; the second respondent denied this.

[114] The discovery of the jewellery from the second respondent's house, showed the untruthfulness of his unsworn statement ie his involvement having ended at Baginda's house when he was asked to leave PW7's car.

[115] Cumulatively, by linking all the connective pieces of evidence when they were together, to the day when the scene of crime was independently and separately shown by them, we are satisfied that the prosecution had established the ingredient of common intention.

[116] The prosecution's case rests substantially or entirely on circumstantial evidence. It is trite that direct evidence of the commission of the offence is not the only source from which a trial court can draw its conclusion prior to a finding of guilt. Conviction can be secured based on circumstantial evidence provided that:

(a) the circumstances from which the conclusion of guilt is to be drawn has been established;

(b) the facts so established is consistent with the hypothesis of the guilt; and

(c) circumstances should be of a conclusive nature in that the chain of evidence is complete so as to exclude any conclusion consistent with the accused person's innocence (see *Magendran a/l Mohan v Public Prosecutor* [2011] 6 MLJ 1; [2011] 1 CLJ 805, *Mazlan bin Othman v Public Prosecutor* [2013] 1 AMR 600; *Dato' Mokhtar Hashim & Anor v Public Prosecutor* [1983] 2 MLJ 232; [1983] 2 CLJ 101; [1983] CLJ (Rep) 10; *Chan Chwen Kong v Public Prosecutor* [1962] 1 MLJ 307; [1962] 1 LNS 22).

[117] It is worth noting that the court had this to say in *Public Prosecutor v Letchumanan a/l Krishnan* [2008] 3 MLJ 290; [2007] 1 LNS 409:

> [22] It is axiomatic under our case law, and we cite the principle repeatedly, that circumstantial evidence alone may be sufficient to support a conviction for murder since the law makes no distinction between circumstantial evidence and direct evidence and, if circumstantial evidence is used to provide for a conviction; it must be inconsistent with any other hypothesis than that of guilt of the accused (see eg, *Kartar Singh & Anor v R* [1952] 2 MLJ 85; [1952] 1 LNS 43, *Idris v Public Prosecutor* [1960] 1 MLJ 296, *Sunny Ang v Public Prosecutor* [1966] 2 MLJ 195; [1965] 1 LNS 171; *Karam Singh v Public Prosecutor* [1967] 2 MLJ 25; [1967] 1 LNS 65, *Chang Kim Siong v Public Prosecutor* [1968] 1 MLJ 36; [1967] 1 LNS 18 , *Public Prosecutor v Hanif Basree Abdul Rahman* [2007] 2 MLJ 320; [2007] 2 CLJ 33 and *Juraimi bin Jussin v Public Prosecutor* [1998] 1 MLJ 537; [1998] 2 CLJ 383).

[118] Faizal Ali J when delivering the judgment of the Supreme Court in *Ram Avtar v The State (Delhi Administration)* AIR 1985 SC 1692, had occasion to state:

> At the very outset we might mention that circumstantial evidence must be complete and conclusive before an accused can be convicted thereon. This, however, does not mean that there is any particular or special method of proof of circumstantial evidence. We must, however, guard against the danger of not considering circumstantial evidence in its proper perspective, eg, where there is a chain of circumstances linked up with one another, it is not possible for the court to truncate and break the chain of circumstances. In other words where a series of circumstances are dependent on one another they should be read as one integrated whole and not considered separately, otherwise the very concept of proof of circumstantial evidence would be defeated.

[119] The above cases have clearly laid down certain guidelines, whereupon in the absence of direct evidence, the prosecution may resort to adducing circumstantial evidence to discharge its burden. Crimes are usually committed in secret and under condition where concealment is highly probable. If direct evidence is insisted under all circumstances, a successful prosecution of vicious criminals, who have committed heinous crimes in secret or secluded places, would be near impossible. In this case not only was the heinous crime

committed at a secluded place but the deceased's body was blasted beyond recognition. Only fragments of bones were found.

CONCLUSION

[120] Without the need to repeat the evidence comprehensively, as adduced by the prosecution and the respondents, suffice if we merely highlight the main ones. The antecedents and movements of the respondents had been successfully established by the prosecution's witnesses and neutral evidence. The discovery of the location of the scene of crime and certain items owned by the deceased came about because of the information obtained from the respondents. With the call logs establishing that the first respondent had made calls from the scene of crime the defence of alibi was unsustainable. By no account he could have been at Bukit Aman or Wangsa Maju at the material time.

[121] In fact this alibi defence was a non-starter as he failed to call the maker of D428. By that failure to call the maker to prove the entry, the first respondent thus was left high and dry, hence the reason why the trial judge said that his defence was a mere denial.

[122] The statements made by the second respondent did not carry much weight either, not because it was unsworn, but because his story was inconsistent with the other cogent evidence tendered in court. In his unsworn statement he said that his involvement with the deceased ended when he left her with the first respondent in PW7's car outside Baginda's house. With the discovery of the deceased's belongings, eg the blood stained slipper in his car, the deceased's jewellery found in his house, let alone his car was detected at the Kota Damansara plaza enroute to Puncak Alam, totally discredited his unsworn statement that his involvement ended outside Baginda's house. With a discredited unsworn statement left as a defence the second respondent was as good as left with no defence.

[123] In the circumstances of the case, with such an abundance of evidence adduced by the prosecution, and the error committed by the Court of Appeal, we find it unnecessary to discuss the appellant's last dissatisfaction of the Court of Appeal's error, when refusing to invoke the proviso to s 60(1) of the Courts of Judicature Act 1964.

[124] Perusing the evidence as adduced by the respondents, we can safely conclude that the respondents had failed to cast a reasonable doubt on the prosecution's case. After a maximum evaluation, we are absolutely satisfied, by alluding to the circumstantial evidence adduced by the prosecution of only one

A inescapable conclusion ie the prosecution has successfully proven its case beyond reasonable doubt as per the charge.

[125] We therefore allow the appeal. The Court of Appeal's order is thereby set aside and the order of conviction and the mandatory sentence of death against the respondents by the High Court for the murder of the deceased are restored and affirmed.

Appeal allowed, decision of the COA set aside and conviction and death sentence against the respondents reinstated.

Reported by Ashok Kumar